He found, in the grave where she had first been buried, the remains of her coffin, some spices, the heel of a woman's shoe, a little ebony cross, and some fragments of linen and of parchment. These and the bones, which had been lying neglected in the garret, he carefully placed in an oaken box, and enclosed them in a mausoleum of black marble, which bears this simple inscription: —

CI-GIT
MADAME DE MAINTENON.
1635 - 1719.

1836.

It is the only relic of the royal house of St. Cyr which can now be found at the *Ecole Militaire.*

ART. IV. — *A Report of the Decision of the Supreme Court of the United States, and the Opinions of the Judges thereof, in the Case of Dred Scott* versus *John F. A. Sanford.* December Term, 1856. By BENJAMIN C. HOWARD, Counsellor at Law, and Reporter of the Decisions of the Supreme Court of the United States. New York: D. Appleton & Co. pp. 389 to 633.

THE decisions of courts are required by law to be promulgated, printed, and published. The reasons of the decision are to be stated, to enable the court to expound the principles of law, and show their bearing on the case; as also to give assurance of the permanency of the rules of law, and of the wisdom and impartiality of their application, by reference to other decided cases. The court may thus justify its conclusions to the jurisconsult, and secure the confidence of the community, while it settles the rights of litigants. The promulgation and publication of judicial opinions is one of the greatest safeguards of the purity of judges, and of the impartiality of their judgments. Published opinions become a part of the literature of the day. They are submitted to the

criticism of the country. The law, the logic, and the morality, embodied and set forth in these carefully studied productions, are the legitimate subjects of examination and criticism. The greater the authority of the writers, the more dangerous are their errors. And the more important the public interests affected by them, the more imperative is the duty of pointing out their errors, or of vindicating their claim to confidence and respect. Moreover, the decisions of the Supreme Court of the United States are in no sense sectional, but national topics. Their validity, their mode of operation, their bearing on the civil *status* of individuals and classes of men, it is the concern of our whole people to investigate and determine. While, therefore, we have felt it our duty, in a Review intended primarily to represent the thought, sentiment, and literature of the nation, to avoid subjects of sectional controversy, this very consideration seems to force upon us the cognizance of a decision, or rather of a series of opinions, emanating from a tribunal which constitutes the judicial mind and conscience of the country, taken collectively.

The plaintiff brought this action of imprisonment, in the Circuit Court of the United States, to try his right to freedom. That court, after sustaining their own jurisdiction against a plea in abatement, rendered a final judgment against the plaintiff on the merits, and in favor of the defendant. The plaintiff then brought a writ of error to the Supreme Court, to obtain a reversal of that judgment, and the establishment of his right.

The judges deliver their opinions *seriatim*, each in his own language, touching at greater or less length such points as he chooses, and referring with approbation or otherwise to such parts as he pleases of the opinions of any of his brethren. Nevertheless, the argument of the Chief Justice is called the opinion of the court, for what reason does not appear on the face of the report. Only one judge expresses his concurrence with the whole of it, and even he manifests a dissatisfaction with a part of it, by rearguing it for himself. Others express assent to different parts of it, or dissent from the whole. No arguments of counsel appear; but the case is argued by the judges with much zeal, and at great length, and by some of

them with great ability and learning, without any apparent partiality or improper respect to the rights or interests of the parties or either of them, but, on the part of most of them, with a keen and steady view to the political results of the examination. All but two members of the court finally agree to turn the plaintiff out of court, as he came in. On what grounds this is done, they have agreed in no common and authoritative annunciation. With two or three exceptions, each judge may now, or hereafter, with perfect consistency, aver his concurrence or nonconcurrence with every proposition contained in the report, except such as he has published in his own name. On what points they agree or disagree must be ascertained, if at all, by analyzing, classifying, and comparing what each one has said, in regard to every point discussed in the case. This we will now attempt to do.

The matter which the court first encountered was the plea in abatement, and the first question concerning it was whether it was legally before them for adjudication. This is a question of practice. It must have been before the court, in some form, on the docket of every term since the court was established. Cases are here cited upon it, running through a period of more than half a century. And yet the honorable court do not *know* what the law is upon this point of practice. The Chief Justice says: "Doubts are entertained by some of the members of the court, whether the plea in abatement is legally before the court upon this writ of error." The question must therefore be argued at length, as an original question, and decided by a major vote, if such a vote can be obtained. It is so argued; and every judge, more or less directly, and more or less at large, expresses his views upon it. We shall see who and how many are the doubters, and who sustain each side of the question.

Mr. Chief Justice Taney says: "The plea in abatement is necessarily under consideration; and it becomes, therefore, our duty to decide whether the facts stated in the plea are or are not sufficient," &c. Mr. Justice Wayne is of the same opinion, concurring, as he says he does, entirely in the opinion of the Chief Justice, "without any qualification of its reasoning or its conclusions" on this or any other question in the

case. Mr. Justice Daniel says: "The question first in order presented by the record in this cause, is that which arises upon the plea in abatement." The idea that it "has been displaced or waived, is regarded as wholly untenable." Mr. Justice Curtis says: "When there was a plea to the jurisdiction of the Circuit Court, in a case brought here by a writ of error, the first duty of this court is, *sua sponte*, if not moved to it by either party, to examine the sufficiency of that plea." Mr. Justice McLean says: "The plea to the jurisdiction is not before us, on this writ of error." Mr. Justice Catron says: "The proceedings on the plea in abatement are not open to the review of this court by a writ of error." Mr. Justice Nelson says: "There is some question" about this matter; but he adds: "In the view we have taken of the case, it will not be necessary to pass upon this question, and we shall therefore proceed at once to an examination of the case upon its merits." He of course is one of the doubters. Mr. Justice Campbell says: "My opinion in this case is not affected by the plea to the jurisdiction, and I shall not discuss the questions it suggests." He therefore does not concur in the opinion, that the plea is necessarily before them, and that it is their duty to decide it. Mr. Justice Grier concurs "in the opinion delivered by Mr. Justice Nelson on the questions discussed by him," of which this is one. He however says: "The record shows a *prima facie* case of jurisdiction, requiring the court to decide all the questions properly arising in it."

Such is the predicament of the court on this first point of the case. Four judges are of one opinion; two of the opposite; two will give no opinion, and one is divided. When Mr. Chief Justice announces, as he does, "We think they — the plea and demurrer, and judgment of the court below upon it — are before us upon this record," he is sustained by Justices Wayne, Daniel, and Curtis only. There is no majority in favor of anything; but a majority against everything suggested; unless it should be claimed that Judge Grier is in favor of something, — in which case it would clearly be impossible to prove the contrary from any disclosure he has made of his views on this point in his published opinion.

Notwithstanding this position of the first question, the Chief

Justice goes on to state the second, as follows: "Whether the facts stated in the plea are or are not sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States?"

The facts stated, as correctly condensed by the Chief Justice, are that the plaintiff is "a negro, whose ancestors were imported into this country, and sold as slaves." The plaintiff alleges that he is a citizen of Missouri; the defendant says that this is not true, because he is "a negro," &c.; and the question is whether these last allegations are sufficient to show, their truth being admitted, that the plaintiff's allegation is false; or in other words, whether a negro, whose ancestors were imported slaves, can be a citizen. This, the learned Chief Justice says, "is certainly a very serious question, and one that now for the first time has been brought before this court," — "and it is our duty to meet it and decide it." Accordingly he labors it through twenty-four pages, and then announces the result as follows: "Upon a full and careful consideration of the subject, the court is of opinion, that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous." Such is the very formal announcement, by Mr. Chief Justice Taney, of what he calls "the opinion of the court" on the second question. Let us now see what the other Justices say upon this question.

Mr. Justice Wayne, like another great man, who always said "ditto to Mr. Burke," concurs unqualifiedly. But notwithstanding this broad adhesion, he still expresses one limitation. He concurs only "in the opinion of the court, as it has been written and read by the Chief Justice," before the whole court, on the 6th of March last. He may perhaps hereafter be glad to avail himself of this limitation, to escape responsibleness for a good deal of absurdity. But it will not apply to the decision of this second question, or to the twenty-four pages of argument preceding it. He assents to all this, and he expressly admits that the court "has decided that the

Circuit Court had no jurisdiction of the case," independently of the examination of the merits. Mr. Justice Daniel concurs with the Chief Justice in sustaining the plea in abatement, and reversing the judgment of the Circuit Court which overruled it. Mr. Justice McLean says: "The plea which raises the question of jurisdiction is radically defective, and the demurrer was properly sustained." Mr. Justice Curtis says: "The plea to the jurisdiction was bad, and the judgment of the Circuit Court overruling it was correct." Mr. Justice Nelson does not concur in the opinion that the plea in abatement is sufficient; for his "conclusion is, that the judgment of the court below should be affirmed," on the merits, which could not be if the suit was abated on the plea. Mr. Justice Grier concurs with Judge Nelson, and says, "that the record shows a *prima facie* case of jurisdiction," (notwithstanding the plea in abatement,) "requiring the court to decide all the questions properly arising in it" (on the trial of the issues to the jury). If he intended to have anything understood, by what he says, this must be a part of it. Besides, he thinks that the final judgment of the court below might properly be affirmed, which could not be if he held the plea in abatement good and sufficient. Mr. Justice Campbell says, his opinion "is not affected by the plea to the jurisdiction"; of course he holds it good for nothing. And again: "My examination is confined to the evidence upon the issues to the jury." He does not hold the suit abated, but to be examined on the merits, and that "the judgment should be affirmed," or at least might be so. Mr. Justice Catron says: "The plea in abatement is not open to the review of this court by a writ of error." Of course the judgment of the court below, overruling it, stands unreversed, and irreversible, in his opinion; and there is "nothing in controversy here but the merits."

The result is, that three judges are for reversing the decision of the court below, on the plea in abatement; and six are against the reversal, — two because that decision is right, one because this court has no authority to examine it, and three without giving any reason. There is no majority for anything, — to reverse, affirm, or waive. The Chief Justice says: "The

opinion of the court is," and we, the court, "have decided, that the Circuit Court erred in deciding that it had jurisdiction upon the facts admitted by the pleadings." Six members of the court, each speaking for himself only, say they have done no such thing.

Here let us make a rest, as the merchants say, and see how we stand. There is no mistake about this matter; there can be none. The Chief Justice undertakes to speak for the court, speaks in their name, in their presence, and, as he says, by their authority; and he speaks officially as the head of the judiciary of the United States, from the seat of justice, to the American people, and to the world. Can his words be anything but verity itself? He says the court have decided "that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous." Judge Wayne says the same. Judge Daniel says that this is in conformity to his opinion. The other six judges do not sustain it. This is the precise position of the Supreme Court of the United States, before the nation and before the world. How was that question decided? The validity of the whole subsequent proceedings depends upon the answer. If that judgment was decided to be erroneous, then all the court did afterwards was *coram non judice*, erroneous, and extrajudicial. And if those proceedings were erroneous, then all that this court can build upon them, or any part of them, is just as groundless, illegal, and extrajudicial as they were. If that court had no jurisdiction, this court had none. If that court could not legally look into and try the merits, neither can this court. For the jurisdiction of the latter is only through the former, and they can only do what the court below should have done, or direct them to do what they should have done without direction. There can be no doubt about this. The Chief Justice himself says, and he speaks for the court in this, if he does in anything: "Passing a judgment upon the merits in favor of either party," (and it makes no difference whether it is in favor of or against either or both parties, or whether it is passing a judgment, or taking the evidence, or directing a verdict,) "in a case which it is not authorized to try, and over which it had no jurisdiction, is as grave an error as a court

can commit." Mr. Justice Wayne expresses the same idea, where, in stating his concurrence with Mr. Justice Nelson on a single point, he adds, "assuming that the Circuit Court had jurisdiction," meaning obviously that, inasmuch as they had not jurisdiction, that point was not before them. Mr. Justice Daniel cites with approbation a case in which this court said: "Any proceeding without the limits prescribed" (that is, without the jurisdiction) "is *coram non judice*, and its action a nullity. And whether the want or excess of power is objected by the party, or is apparent to the court, it must surcease its action or proceed extrajudicially." Again he says: "The questions subsequently raised upon the several pleas in bar might be passed by, as requiring neither examination nor adjudication." Nevertheless, under the circumstances, he says: "To me it seems proper that they should here be fully considered," &c. Mr. Justice Curtis says: "To examine the merits of the case," of which "the Circuit Court had not jurisdiction, and . . . . to which the judicial power of the United States does not extend, ... transcends the limits of the authority of the court, as described by its repeated decisions, and, as I understand, acknowledged in this opinion of the majority of the court." For any court to attempt to decide cases not legally within their jurisdiction, is against law. It is a violation of the rights of parties; and when the attempt is made in reference to great national questions, affecting the political or civil rights of the body of the people, it is in every just sense of the word *usurpation*, and should be treated as such by the community whose rights are thus outraged.

The whole authority of the case hinges on this point. If the judgment of the court below, on the plea in abatement, is reversed, and that plea adjudged sufficient, then that court had no jurisdiction, and all subsequent proceedings on the pleas in bar, in both courts, are extrajudicial and void. If that judgment is affirmed, or allowed to stand in force and not reversed, then that court had jurisdiction, and all legal proceedings on the pleas in bar, in both courts, so far as they were necessary to enable them to determine the rights of the parties, on the merits, are valid. If it cannot be determined, from the official report, whether the judgment on the plea in abatement was

reversed or not, then the case is of no authority on any point.

This point not only affects the authority of the case, but it involves the character of the court, the personal credit of the judges, and the honor of the nation. It is known to the public, that this opinion of the Chief Justice, or certain parts of it, and particularly the long argument and decision on the second question, now under consideration, was read by him from the bench, as the opinion of the court, in the presence of all the judges, on the 6th of March last. On that day and the following, opinions were read by other members of the court, some of which were soon after printed and given to the public. Subsequently all the opinions we now have were given to the official reporter, and more recently, between two and three months after the original promulgation, they are all printed for the use of the public, in the form now before us. That they are not a mere transcript of what took place in court, is sufficiently manifest from internal evidence, without resort to the information of those who heard them. The Chief Justice's opinion has sustained material interpolations; one or more of the others have been reproduced entire, since that time; and others still have undergone alterations more or less material. But which of their honors have been guilty of beguiling the Chief Justice into the awkward position of promulgating, as the opinion of the court, a decision which only two of them will now back up and sustain? Did he not previously read the opinion to all the judges in private free consultation? Did not a majority of them then agree to it and adopt it, and request him to read it publicly as their opinion? How then will they justify themselves? Is it anything short of absolute perfidy in them, now to abandon him, and repudiate the decision? What obligations can he be under to screen them from the consequences of such conduct, by concealing their names? Or will they say that they never did agree to it, and that he acted without their authority in promulgating such opinions in their names? If so, there can be no difficulty in asserting that he is placed in a false position, and under an imputation beneath which he ought not to rest.

The dispute must probably lie within a very narrow compass. Justices McLean and Curtis will certainly not be suspected of having assented to the doctrine, that a negro cannot be a citizen, and that the plea in abatement was sufficient. Justice Nelson probably will not, for he is in favor of affirming the judgment below. Nor Justice Catron, for he says the plea is not before them, and they have no right even to consider it. Of course he never could have consented to reverse the judgment on it. Justices Grier and Campbell only remain. What say you, Mr. Chief Justice, did Justices Grier and Campbell, or either of them, authorize you to deliver that opinion for them, and agree to stand by it, and afterwards write and publish opinions of their own repudiating it, leaving you in a minority of three against six? What say you, Justices Grier and Campbell, did Mr. Chief Justice Taney assume to deliver an opinion for you, without your consent, and then accuse you of bad faith, because you repudiated it, and publicly refused to confirm it?

The issue is to the country. But whatever may be the result of this difference, how stands the fact? Is it as stated by the Chief Justice, that the judgment below on the plea in abatement is actually adjudged erroneous, and reversed; or is it left in full force, not reversed or vacated? It would seem that this question is now to be treated as of no manner of consequence. The publication of the opinion having promulgated its doctrines as the doctrines of the court, the truth in regard to the actual decision is of no importance. Accordingly the Chief Justice says, in his interpolated opinion, as now printed by authority: "If that plea is regarded as waived, or out of the case upon any other ground," — as, for instance, on the ground that it is bad and insufficient, as the court below decided, — "yet the question as to the jurisdiction of the Circuit Court is presented" by the merits, so it makes no difference. He therefore goes on, with the other judges, to examine and decide the case, on the merits, as they appeared in evidence, and on the verdict given on the trial of the pleas in bar, without regarding whether that trial was illegal and extrajudicial or not. We shall hereafter see with what success.

In the mean time let us see what are the principles in-

tended to be established, if a vote of the majority had sanctioned the sufficiency of the plea in abatement. The broad question presented by the plea was whether any descendant of imported African slaves, however remote, and however minute the remaining portion of African blood, could be a citizen. The negative was monstrous ; and it was not sustained even in the Circuit Court of Missouri. Yet three judges of the Supreme Court of the United States were found ready to sustain it, in all its length and breadth ; and more of them probably would, if it had not been thought expedient to evade it, after the *exposé* made by the dissenting opinions, in order to come at ulterior questions. The Chief Justice and Judge Daniel have devoted thirty-five pages of argument to the labor of sustaining it.

The argument starts with the identity in constitutional language of the terms " citizens and people," which " describe the political body who form the sovereignty, hold the power, and conduct the government," — " the sovereign people ";* and with the admission that any State, both before and since the adoption of the Constitution, may make whom it may please, even aliens, citizens, so far as the State itself is concerned.† " Every person, and every class and description of persons, who were at that time recognized as citizens in the several

* This definition would hardly include women and minors.

† Persons made citizens by State laws vote, by virtue of those laws, in the election of all the elective officers of the general government, and of course hold a part of the sovereignty of the country, rightfully and constitutionally, and are directly within the Chief Justice's definition of citizens. Besides, if they are not general citizens, it would follow that we may have a President and members of Congress, legally elected, and the whole government controlled by the authority, legitimate and lawful, of those who are not citizens of the United States. It is repeatedly asserted in the course of these opinions, and not directly denied by any of the judges, that there is a citizenship of the United States independent of, and not arising from, or connected with, a citizenship of any of the States. If this be so, what are the rights and privileges of such citizenship ? They certainly do not include a participation in the government of the country ; for the right of suffrage, in regard to officers of the general government, is granted and controlled exclusively by State laws. They do not include any rights of general citizenship in all the States ; for these are conferred by the Constitution only on " the citizens of each State." And they do not include the right particularly in question in this case, the right to sue in the United States courts ; for this too is conferred only on a citizen of a State. This court have decided that an inhabitant of the District of Columbia cannot be a party to a suit with an inhabitant of one of the States, in virtue of this clause of the Constitution.

States, became also citizens of this new political body." But the privileges of citizens in this new sovereignty were limited to "those only who were *then* members of the several State communities, or who should afterwards, by birthright or otherwise, become members,* according to the provisions of the Constitution, and the principles on which it was founded. Imported slaves and their descendants, though they had become free, "were not acknowledged as a part of the people." They were considered as an inferior and degraded race, who "had no rights which the white man was bound to respect." They were "bought, and sold, and treated as an ordinary article of merchandise and traffic," among all nations, and nowhere more so than among the English and their American Colonies. "The general words" in the Declaration of Independence and in the Constitution, though broad enough "to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood," do not include them. Two clauses only of the Constitution point to them specifically. "One of these clauses reserves to each of the thirteen States the right to import slaves, until the year 1808." "By the other, the States pledge themselves to maintain the right of property of the master." "These two provisions show, conclusively, that neither the persons therein referred to, nor their descendants, were embraced in any of the other provisions of the Constitution." The number of those emancipated was comparatively small, and they were identified with the race. They were not in the minds of the framers of the Constitution, when they were conferring rights and privileges on citizens of the United States. The power of naturalization is given exclusively to Congress, and restricted to foreigners, and the more dangerous power of raising the degraded class to the rank of citizens never could have been left to the States.

* What provision does the Constitution of the United States make for persons becoming "members" of "the new political body," by "birthright or otherwise," (except by naturalization, which extends only to foreigners,) unless it be through and by means of a citizenship of a State acquired by descent or otherwise in virtue of State laws? If the Constitution of the United States recognizes a general citizenship acquired in the States by birth, otherwise than this, it must extend equally to *all* the children of the "sovereign people," which would ill comport with the object of the Chief Justice's argument.

The rights secured by the Constitution to citizens of one State in all the others, are for temporary sojourners only. If a person migrates, he becomes an inhabitant of the State he goes to, and his *status* there must be fixed by its own laws.* Judge Daniel on some of these points is a little more explicit than the Chief Justice. He says expressly: "The African was not deemed politically a person. He was regarded and owned, *in every State*, as property merely." After the adoption of the Constitution, "State power would be incompetent to bestow a character or *status* created by the Constitution." From such groundless assumptions, false premises, and sophistical conclusions, it is some relief to turn to the dissenting opinions.

Mr. Justice Curtis sustains the decision of the court below, on this point, in an argument, full, thorough, and unanswerable. "A citizen of the United States at the time of the adoption of the Constitution," in constitutional language, means a citizen under the Confederation, and applied to all who were citizens of the States. Five States, New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, then recognized as citizens, and admitted to the rights of citizens, including the right of suffrage, all their free inhabitants, without regard to color or descent. They were a part of the people, by whom the Constitution was made, for themselves and their posterity. It recognizes citizenship by birth, — "a natural-born citizen." The States originally possessed the power of determining what persons should or should not be citizens. This power they have not delegated to the general government, except in the case of aliens. The disabilities of alienage, Congress alone can remove; but of the native-born inhabitants, such are citizens as their own State laws make so, and no others.† They are the people, consti-

* So that, although a State cannot make any person a citizen of the United States by conferring on him any or all of the rights of a citizenship of the State, which it has a perfect right to do, yet if a person, who is a citizen of the United States, migrates from one State to another, the State to which he goes may degrade him to any *status* it may please. Thus the Constitution authorizes levelling down, but does not permit any levelling up.

† If any of the native-born inhabitants of the country are aliens in any of the States, their alienage is not such as the people have granted to Congress the power

tute the body politic, and carry on the government. They, and they only, by virtue of State laws, elect the President, Vice-President, and members of Congress, and the general government cannot enfranchise or disfranchise a single individual. By virtue of State citizenship, they are made by the Constitution general citizens. Besides all who were originally citizens, their descendants, and others who have been made citizens under State laws, multitudes have been added by treaty, of all shades of color and all mixtures of blood, — Mexicans, Indians, and the free colored inhabitants of Louisiana and Florida. For aught appearing in the plea, the plaintiff may have belonged to any one of these classes, though the descendant of a slave, and may consequently have been a citizen. Mr. Justice McLean also speaks out boldly, and says: "A slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence."

But the majority of the court agreed to nothing positively on this part of the case, and to nothing negatively, except not to sustain the plea. The decision, therefore, is authority for nothing, but a simple negation, or rather want of affirmation, of the broad and monstrous proposition on which the plea was founded.

After pronouncing the decision of the court on the plea in abatement, as already quoted, the Chief Justice has inserted in the official report a long episode in reply to the dissenting opinions, as to the right of examining questions subsequently arising on the trial of the merits; and Mr. Justice Wayne has favored us with a reproduction of the same matter. There is, however, little that is intelligible, and less that is reasonable, in either. They prove, to be sure, the futility (to use the language of Mr. Justice Wayne) of "any attempt to control the court from doing so by the technical, common-law rules of pleading," or anything else; and show that, notwithstanding what Mr. Chief Justice Taney has elsewhere said, they will, if they please, "write opinions for the newspapers and debating

to remove. The only alienage over which Congress has any power is that of foreign birth, to be removed by naturalization laws. The power to remove the disabilities of any other alienage, if such exists, is among the reserved powers of the States.

clubs." Mr. Justice Daniel has the whole of it in shorter terms, when he says, "To me it seems proper" so to do, — *sic volo.*

But the common sense of the country is not to be imposed upon in this manner. If the plea in abatement is adjudged sufficient, as the Chief Justice says it is, the suit is, *ipso facto*, abated, and at an end. There is nothing afterwards before the court to be judicially adjudicated or considered. The parties are out of court. What is jurisdiction, but a right to hear and try the case? And what is the want of jurisdiction but the negative of that, — the right to let it alone? When this negative is settled, nothing remains but to conform to it. Anything else done afterwards is extrajudicial. It cannot affect the parties or their rights, and is of no consequence to any one, unless it be to the newspapers and debating clubs.

Here the court proceed to take up the case on the merits. By the pleas in bar, the defendant confessed, and justified the imprisonment complained of, by alleging that the plaintiff and his family were his slaves, and on the truth of this justification issue was joined. The only evidence laid before the jury on this issue was certain facts agreed to by the parties, on which, by the direction of the court, they found their verdict for the defendant, affirming the truth of the justification, and on which the court below rendered a judgment in his favor. To reverse that judgment, the plaintiff brought this writ of error. The general question was, whether the jury were rightly directed, or, in other words, whether the agreed facts showed the parties to be slaves. On this question a majority of the court, seven to two, have no difficulty in agreeing at once, that the plaintiff and family are slaves, and have no merits and no rights whatever. This is the first point on which the court have found themselves able to make a majority for or against anything.

What does this decision involve? The first fact on which the plaintiff relies to sustain his freedom is his residence in Illinois. In 1834 he was a slave in Missouri, and was carried by his master to the State of Illinois, where he remained, in the service of his master, two years. He was some time afterwards carried back to Missouri, having remained during the

intermediate time in the same service. The decision, therefore, involves, first, the effect of a residence where slavery is prohibited by law; and, secondly, the effect of a subsequent return to a place where slavery is sanctioned by law.

As to the first point, the effect of residence in a free State, the seven Democratic judges, constituting the majority in this case, are all but entirely silent. It were well that they had been totally so. But Mr. Justice Catron remarks, "Unless the master becomes an inhabitant of that State," that is, permanently domiciled there, "the slaves he takes there do not acquire their freedom." And Mr. Justice Nelson, for himself and the rest, threatens, as soon as they can find a case,* to decide that a slaveholder has a right to carry his slaves into any of the free States, for temporary purposes, and to withdraw them when he pleases, in contempt of all their laws. This would seem to be perfectly in character. The Chief Justice does not hesitate to assert, and to repeat, that "the right of property in a slave is *distinctly and expressly affirmed* in the Constitution."† And six of them, at least, hold that Congress have no power to establish liberty or restrain slavery in any of the States or Territories of this Union. Nothing, therefore, remains, but to break down the efficacy of State constitutions and laws in favor of liberty, and slavery stalks unrebuked universally over the land. If neither the Constitution of the United States nor the constitutions of the States can protect personal freedom, no man, whether white or black, (for the Constitution makes no difference,) has any guaranty of protection by the strong arm of the law, for himself or his posterity, against the superior strength and intelligence of his more powerful neighbor. Verily, it is the opinion of these men, that this free government was established on purpose to extend the blessings of the glorious institution of slavery. The preamble should be altered.

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* Thus invited, a case is not likely to be long withheld. Indeed, it is understood that one is already in progress.

† What can be done for a man capable of such utterances? One, too, who has actually read the Constitution? Judge Daniel expresses a similar sentiment: "The Constitution guarantees to the slaveholder the title to his property, — the only private property which the Constitution has *specifically recognized*."

But the opinions of the other two judges give us a little light upon this subject. Mr. Justice McLean says: "The civil law throughout the Continent of Europe is, that slavery can exist only within the territory where it is established." "It is of a nature that nothing can be suffered to support it but positive law." This was the law of England, as promulgated by the Court of King's Bench in Somersett's case, before our Revolution, and was, of course, the law of this country. The same principle was held by this court in Prigg's case, where it was declared unanimously, "that slavery is limited to the range of the laws under which it is sanctioned." Mr. Justice Curtis says: "Slavery, being contrary to natural right, is created only by municipal law. This is not only plain in itself, and agreed by all writers on the subject, but is inferable from the Constitution, and has been explicitly declared by this court. The Constitution refers to slaves as 'persons held to service in one State, under the laws thereof.' Nothing can more clearly describe a *status* created by municipal law." The inference from these principles is direct and conclusive, that, at the boundary of the State, where the law ceases, the *status* created by it ceases also.

But though the majority of the court have little to say on this point, they are abundantly clear on the second, to wit, the effect of a return to a slave State. On this the Chief Justice says: "His *status*, as free or slave, depended on the laws of Missouri, and not of Illinois"; "it is now firmly settled,* by the highest court in the State, that Scott and his family, upon their return, were not free, but were, by the laws of Missouri, the property of the defendant"; "and this court had no jurisdiction to revise the judgment of a State court upon its own laws." In these positions he is sustained by a majority of the court, and by some of them in elaborate arguments. The principal authority, however, in justification of

* "Firmly settled," by two judges against one. It would seem to be a useless labor to attempt to find out what the law of Missouri is, if two men can make it what they please, *ex tempore*, as they did in this case, reversing a uniform series of decisions from the foundation of their government, because "times are not as they were when the former decisions on this subject were made." See 15 Missouri Reports, 682, Scott *vs.* Emerson.

the result, is the opinion of Lord Stowell in the case of the slave Grace. She had been carried from Antigua to England, and returned to Antigua, without having claimed her freedom. Lord Stowell held that, when she resumed her domicile, she resumed her *status*. But in the application of this authority, the obvious distinction between different local laws made and administered by one king and parliament, and the different laws of the independent States of our Union, is not much discussed.

These three positions are all denied by the dissenting Justices, McLean and Curtis. Mr. Justice McLean says: "This is far from being a Missouri question." Mr. Justice Curtis, after admitting that it is competent for any civilized state, if it pleases, by "positive law," to refuse "to allow such effect to foreign laws as is in accordance with the settled rules of international law," — and denying that it is "within the province of any judicial tribunal to refuse such recognition," — says, that on this subject the "law of Missouri is the common law, introduced by statute in 1816," and that "the common law adopts, in its full extent, the law of nations, and holds it to be a part of the law of the land"; that the opinion of the majority of the Missouri court in this case "is in conflict with its previous decisions, with a great weight of judicial authority in other slaveholding States, and with fundamental principles of private international law"; and that, "sitting here to administer the law between these parties, I do not feel at liberty to surrender my own convictions of what the law requires, to the authority of that decision." Nevertheless, a majority of the court hold that the plaintiff is a slave. Two years' residence in a free State, with the consent of his master, did not make him a free man, on his return to Missouri. This was the whole principle in dispute, on the merits, and the court have now decided it. The plaintiff is not entitled to the freedom he sued for. What more is to be done?

If the suit was abated, as the Chief Justice said it was, it was of no consequence; they had still a right, as he said, to go on, and decide the merits. They have now decided the merits. Do they stop here? or is other work to be done? Does deciding the merits end the case? By no means. "There is still much land to be possessed."

After having resided two years in Illinois, where slavery was prohibited by the Constitution, the plaintiff went with his master to the territory north of Missouri and west of the Mississippi, now Minnesota, where slavery was prohibited by what has been called the Missouri Compromise Act of 1820, and resided there two years more, under precisely the same circumstances. This act was made for the purpose of introducing Missouri into the Union as a slave State. Having answered this purpose, and this only, the restricting clause or proviso was repealed in 1854. There were political reasons, however, for desiring a judicial condemnation of the restriction as unconstitutional. The pressure upon the judges, as political men, was no doubt severe. There are precedents, unfortunately, for such pressure being found too severe for judicial virtue. How was it sustained in this case? Was it of any consequence to Dred Scott, or his master, whether the Missouri Compromise was constitutional or unconstitutional? Not the least. He had resided in a State where the restriction of slavery was certainly constitutional, and on his return finds himself a slave, by the decision of this court. He has now lived in another place, where there is a similar restriction, — valid or invalid. Does it make any difference to him which? Not at all.* If the restriction is valid, on his return he is still a slave. If it is invalid, he is certainly no worse off. But the question must be decided. How can it be got at? When can it be reached, if not now? So, though it does not concern the rights of the parties a particle, and has no influence on the merits of the case in any way, yet the occasion must be seized to settle that question; and, as Mr. Justice Daniel says, "so far † as it is practicable for this court to accomplish such an end, finally put (it) to rest."

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* This is expressly admitted by Mr. Justice Daniel, who says: "Conceding to that provision the validity of a legitimate exercise of power, still this concession could by no rational interpretation imply the slightest authority for its operation beyond the territorial limits."

† This cannot be very far, unless their successors, and others, should treat their opinions with more respect than they treat their own, or those of their predecessors, and the practical decisions of the other branches of the government. The Chief Justice himself, in this very case, gives as a sufficient reason why a particular question brought before the court was not decided, that "it was not required by

In meeting this question, the Chief Justice, with whom agree Justices Wayne and Grier, admits that the power to make "all needful rules and regulations respecting the territory and other property belonging to the United States," where they have the sovereignty as well as the ownership, includes the power of general legislation; but says that the grant extends only to the territory which belonged to the government at the time the Constitution was adopted. All the power they have to legislate for territories since acquired, is inferred from the power to admit new States. This includes the power to acquire territory for that purpose, and the power to acquire it necessarily includes the power to govern it, and its inhabitants, till they are duly fitted to be made States, and introduced into the Union.

Thus a direct grant of adequate power, conferred by plain and apt words, must first be construed away; and then the same power reclaimed, by remote inference from another power, granted for a distinct and specific purpose, and not intended or supposed to contain a power of acquisition at all, nor so construed till certain exigencies were thought to require its extension to that object, which construction is now sustained in deference to the practice of the government, while such practice is good for nothing in settling the meaning of other parts of the Constitution. Why all this is done, it is difficult to imagine, unless it be to show that the Constitution is a mere nose of wax, and may be made to mean anything or nothing, in the hands of power, precisely as the political exigencies of the day may require.

But the plenary right to govern the Territories is conceded to Congress. This agrees with the practice of the government from its origin, and the Supreme Court sanctioned it by a direct adjudication, long ago, pronouncing the "possession of it unquestionable," — "and in this," the Chief Justice says, "we entirely concur." Justices Daniel, Campbell, and

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the case before the court." Mr. Justice Wayne asserts the same principle, when he says: "Nor has any point been discussed and decided, which was not called for by the record, or which was not necessary for the judicial disposition of it." If this assertion is not justified by the fact, it at least shows his opinion as to what the fact ought to have been.

Catron, with more or less distinctness, seem to find this power in the direct grant to Congress of power to make "all needful rules and regulations respecting the territory belonging to the United States." Judge Nelson, having decided the whole case on the other point, very properly abstains from giving any opinion on subsequent questions.

Their great difficulty is, to find some limitation or qualification of the admitted general legislative power over the Territories, which will exclude Congress from the power of restricting slavery therein. All agree that "no powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit." But which of these prohibitions protect slavery? The Chief Justice pitches upon the clause from *Magna Charta* which says: "No person shall be deprived of his property, without due process of law"; and he says the Constitution affirms slaves to be property. Mr. Justice Campbell says that anything is property which any of the States choose to consider such, and the federal government is bound to recognize it. Mr. Justice Catron finds the much desired limitation in the third article of the treaty of cession of Louisiana. And Mr. Justice Daniel finds it in an infringement of the equal "rights of purchase, settlement, occupation," &c., which he says "every citizen would have, if," as he very discreetly adds, "any *one* could claim it." Indeed this last idea seems to be more or less resorted to by them all.

Mr. Justice Curtis answers each of these positions separately and conclusively. As to *Magna Charta*, it was a part of the law of England before the settlement of this country, — was brought here "by our ancestors, as part of their inherited liberties," — was the law of every State in the Union when it was transferred to the Constitution of the United States, and is now probably, in some form, embodied in the constitutions of all the individual States. Under it the slave-trade has been prohibited in England; by all or nearly all the original States of this Union; and by the United States, for fifty years. The violation of these prohibitions involves a forfeiture of the property. If all this does not show that slavery is not protected by *Magna Charta*, it will be difficult to ascertain when or how the meaning of any law is ever to be known. As to the Louisi-

ana treaty, the third article, concerning the enjoyment of property, was not adapted or intended to have the effect claimed for it; if it had been, it could not have controlled the action of Congress. And lastly, whatever effect it could have had, the "stipulation ceased to operate when Louisiana became a member of the Union." And as to "equal rights," the territory was acquired for the benefit of the people collectively, not individually; and the equality of individuals respecting its settlement, occupation, &c. consists in an equal destitution of all right, except such as may be allowed on the terms and conditions contained and prescribed in duly authorized laws.

But though Congress may restrict slavery in the Territories, it by no means follows that they have power to establish it. The general legislative power of Congress over the Territories, though extended to a great variety of subjects which are not embraced in its jurisdiction over the States, is nevertheless limited by the general principles of our government, and the express prohibitions of the Constitution. It will hardly be pretended that they could establish an hereditary monarchy or aristocracy there. As little can they create privileged orders of any sort. If they can appoint one class or order of men to rule and another to serve, one for masters and another for slaves, this power is not necessarily to be limited or confined to any difference of color or blood; for the Constitution recognizes none. They may as well distinguish between the English and the other European races, as between the European and the African; or between the Carolinian and the New-Yorker, or the Pennsylvanian and the Virginian, as either. If they can make slaves at all, they may as well make white ones as black. If they can deprive one man of his liberty without due process of law, they may so deprive any number, or all, and thereby have an entire colony of slaves. If any part of this can be done, under the principles of our free government, all the prohibitions of our Constitution are not worth a rush. What is the freedom of speech, or of the press, or even a promise of the free exercise of religion, worth, to men who are liable to be deprived of all right to their own bodies, and all care for their own souls? And what is a Constitution

worth, which affects to secure certain particular rights only, and leaves the great aggregate of all rights exposed to depredation? Besides, if Congress can introduce and establish slavery anywhere, under the authority of our Constitution, they can and ought to regulate, protect, and enforce it; and the time is not distant when they, or those acting under them, will be called upon to enact a whole code of slavery laws,* which would be as congruous with the spirit and principles of our Constitution, as a code regulating and enforcing the relative rights and duties of hereditary kings, lords, commons, and villains.

Three points were intended to be decided in this case: that a negro cannot be a citizen; that a slave, after residing in a free State, with the consent of his master, and returning to a slave State, continues a slave; and that the Missouri Compromise, or any other restriction of slavery in the Territories, is unconstitutional. By grasping at too much, the court have lost the whole. As a judicial decision, the case can have no legal authority on either point. Not on the first, because the position is sustained by only three judges. Not on the second, because five judges,† a majority of the court, say the suit was abated by the plea to the jurisdiction, and judgment was so ordered, which legally put an end to the cause. Not on the third, for the same reason, and for the additional one that the question did not affect the rights of the parties, and so its decision "was not required by the case."

This is the character of the case, considered in a legal point of view, and as a judicial act of the court. But as a political manual or text-book, an authorized registration of the political heresies of the dominant party of the day, it will be all it was intended to be. It will form a rallying-point and ear-mark for political partisans, till some other absurd dogma shall be called for, and created to stand in its place.

As to the practical influence of the decision, the case will

* Has not this been already attempted in Kanzas, under the authority of the United States?

† Mr. Chief Justice Taney, Mr. Justice McLean, Mr. Justice Wayne, Mr. Justice Daniel, and Mr. Justice Curtis.

probably disappoint both parties, those who approve and those who disapprove its principles. A Missouri Compromise restriction of slavery, under the authority of Congress, is little likely to be again enacted, or to be asked or desired by any portion of the people; and as little before as since this decision. Slaveholders will not be apt to trust their slaves, voluntarily, in the free States, where no law can restrain their departure for an hour, or reclaim them when they depart, from any expectation they may indulge of holding them again in slavery when they get them back. Such States as may choose to invest their free colored inhabitants with any or all of the rights of citizenship, will not be likely to desist therefrom, on account of any of the considerations presented by the court in this case. Thus, but for its effect on the character of the court, the world will probably move on very much as it did before. The country will feel the consequences of the decision more deeply and more permanently, in the loss of confidence in the sound judicial integrity and strictly legal character of their tribunals, than in anything beside; and this perhaps may well be accounted the greatest political calamity which this country, under our forms of government, could sustain.

ART. V. — 1. *Poems by* ELIZABETH BARRETT BROWNING. New York: C. S. Francis & Co. 1857. 3 vols. 32mo. (Blue and gold.) pp. 378, 385, 354.

2. *Poems by* ELIZABETH BARRETT BROWNING. New York: C. S. Francis & Co. 1857. 3 vols. 16mo. pp. 396, 434, 366.

MRS. BROWNING is sometimes spoken of as ranking among the first female poets. To many this would not seem great commendation. There is much in the education of women, in the present state of society, that unfits them for the highest success in literature, or in any of the creative arts. It is not impossible that there is something also in their very nature,